I.T.O. Corporation of Baltimore *and* Garris S. McFadden. Case 5-CA-11921

December 16, 1982

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 30, 1982, Administrative Law Judge Joel A. Harmatz issued the attached Supplemental Decision in this proceeding. Thereafter, the General Counsel filed limited exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief, and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge to the extent consistent herewith.

The General Counsel requested, in the backpay specification, that Respondent be ordered to report to the Steamship Trade Association (S.T.A) that discriminatee Garris McFadden had worked the additional number of hours that it was determined he would have worked absent the discrimination against him; these hours are the basis of computing vacation pay, and other benefits not at issue here. The Administrative Law Judge found such an order inappropriate under the Board Rules and Regulations, Section 102.53, which he read as limiting his authority in this proceeding to determining an amount of money owed by Respondent to the discriminatee. However, the Board has held that the purpose of these proceedings is "to resolve controversy in *compliance* situations . . . ." and therefore has rejected the interpretation of the Rules on which the Administrative Law Judge relied. *Amoco Production Company*, 233 NLRB 158, 161 (1977) (emphasis in original). In this case, we consider a reporting order such as requested by the General Counsel to be an appropriate means of implementing the Board's make-whole remedy; we note that the number of hours worked in a particular year is not only the basis, under Respondent's collective-bargaining agreement, for computing vacation pay in that particular year, but also affects the amount paid in future years. On the merits, we agree with the Administrative Law Judge's conclusion that, but for the discrimination against him, McFadden would have worked the number of hours worked by Foreman Theodore Burca during the backpay period; we will therefore order Respondent to report the additional number of hours necessary to give McFadden credit for the number of hours Burca worked.

The General Counsel also excepts to the Administrative Law Judge's finding that McFadden willfully incurred a loss of interim earnings on the 47 days during the backpay period when he did not register at the S.T.A. hiring center; we find merit in this exception. Beginning in mid-March 1980, about a month after his discriminatory demotion, McFadden worked regularly as a tractor operator for various employer-members of S.T.A. While the record shows some weekdays in the backpay period on which he did not register at the hiring center, it also shows weekend days on which he worked. McFadden worked from 58 to 71 days in each quarter of the backpay period, except for the first. There is thus no basis to find that at any time after mid-March 1980 McFadden was unavailable for work.[1]

In the first full 4 weeks following his unlawful demotion of February 11, McFadden did not register at the hiring center, in effect "declining" employment as a tractor operator to which he would have been referred had he registered. However, the Administrative Law Judge correctly found that this position was not substantially equivalent to the foreman's position from which McFadden was demoted. Thus, McFadden's failure to accept such employment is not in itself grounds for any reduction in his backpay. *Keller Aluminum Chairs Southern, Inc.*, 171 NLRB 1252, 1256 (1968); *Florence Printing Co.* v. *N.L.R.B.*, 376 F.2d 216, 220–221 (4th Cir. 1967), cert. denied 389 U.S. 840 (1967); *Mastro Plastics Corporation, and French-American Reeds Manufacturing Co., Inc.*, 136 NLRB 1342, 1352 (1962), enfd. in relevant part 354 F.2d 170 (2d Cir. 1965).

The burden remains on Respondent to show that McFadden did not make a diligent search for suitable interim employment; *Mastro Plastics Corporation, supra* at 1346. Respondent submitted no evidence tending to show this. Moreover, the sufficiency of a discriminatee's efforts to mitigate backpay will be determined with respect to the backpay period as a whole. *Saginaw Aggregates, Inc.*, 198 NLRB 598 (1972). A discriminatee is not required to seek work instantly. *A. S. Abell Company*, 257 NLRB 1012, 1015 (1981); *Saginaw Aggregates, supra; Nickey Chevrolet Sales, Inc.*, 195 NLRB 395, 398 (1972). McFadden's work record in the whole backpay period leaves no doubt that he sought, in good faith and with reasonable diligence, to miti-

[1] While Burca worked more hours than McFadden during this period, we have already found, as noted, that this was a result of the unlawful discrimination.

gate his backpay. We therefore find it unnecessary to consider what McFadden did during the initial 4 weeks in question.[2] As it has not been demonstrated that McFadden willfully incurred any loss of earnings, we will not apply any credit against his backpay, and we will amend the Administrative Law Judge's recommended Order accordingly.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, I.T.O. Corporation of Baltimore, Baltimore, Maryland, its officers, agents, successors, and assigns, shall:

1. Pay to Garris McFadden the sum of $40,068.22, plus interest accrued to the date of payment as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).

2. Notify the Steamship Trade Association of Baltimore, Inc., that Garris McFadden is to be credited with the following numbers of additional hours worked in the contract years indicated:

Year ending September 31, 1981: 776 hours
Year ending September 31, 1982: 393 hours

[2] We do not adopt the Administrative Law Judge's discussion of *Sopps, Inc.*, 189 NLRB 822 (1971), or *Iowa Beef Processors, Inc.*, 255 NLRB 1328, fn. 3, 1332 (1981).

SUPPLEMENTAL DECISION

JOEL A. HARMATZ, Administrative Law Judge: This supplemental backpay proceeding derives from a Decision and Order of the National Labor Relations Board, dated April 16, 1981, wherein it was found that Respondent demoted Garris S. McFadden in violation of Section 8(a)(1) of the Act because he had engaged in concerted activity protected by the Act.[1] Following issuance of the aforedescribed Decision and Order, Respondent, by stipulation dated October 8, 1981, *inter alia*, conceded to the validity thereof. However, controversy remained as to the amount of backpay due. Accordingly, on October 21, 1981, a backpay specification and notice of hearing was issued by the Acting Regional Director for Region 5. In its duly filed answer thereto, Respondent contested the formula used by the General Counsel in computing gross backpay and raised other issues with respect to net backpay claimed. Pursuant thereto, a hearing was held before me in Baltimore, Maryland, on April 1 and 2, 1982. Following close of the hearing briefs were filed on behalf of the General Counsel and Respondent.

Upon the entire record herein,[2] including my direct observation of the demeanor of the witnesses while testifying and consideration of the post-hearing briefs, it is concluded as follows:

[1] *I.T.O. Corporation of Baltimore*, 255 NLRB 1050.

[2] Errors in the transcript have been noted and corrected.

I. THE UNDERLYING UNFAIR LABOR PRACTICE CASE

In its Decision and Order of April 16, 1981, the Board affirmed the recommended Order of Administrative Law Judge Stanley N. Ohlbaum to the effect that Respondent violated Section 8(a)(1) of the Act by demoting Garris McFadden because of his joining, with other employees, in the protest of certain racially discriminatory practices on the Baltimore waterfront. In doing so, the Board adopted, in substantial part, the recommended remedy of the Administrative Law Judge whereby Respondent was required to offer Garris McFadden "immediate, full and unconditional reinstatement to the job from which he was demoted by Respondent on or about February 11, 1980 . . . without prejudice to his seniority and other rights, privileges, benefits and emoluments . . . ." It was further provided that McFadden be made whole for losses sustained by reason of the discrimination against him.

II. THE INSTANT PROCEEDING

A. *General Statement of the Issues*

The General Counsel claims the sum of $40,538, plus interest, as the net backpay due and owing to McFadden. Respondent, on the other hand, urges that all obligations under the terms of the Board's Order have been satisfied and no further backpay liability exists.

This division is marked by diverse views held by the parties as to the position held by McFadden when downgraded.[3] In this regard, the General Counsel contends that, at all times between March 1979 and his February 1980 demotion, McFadden was a "regular foreman." Respondent argues that this was not the case but that his status never exceeded that of a "temporary foreman."[4] As shall be seen, resolution of this issue has considerable bearing on the extent of Respondent's liability, affecting as it does the fundamental soundness of the General Counsel's formula for computing gross backpay.

Turning to other matters, it is noted that at least some key elements are conceded. Thus, no claim is made by

[3] Although Respondent contends otherwise, this question was not resolved in the underlying unfair labor practice proceeding. As the demotion was a conceded fact, it was unnecessary for the Board to determine, and no pronouncement was made as to whether the original position held was "regular," as the General Counsel contends or as Respondent contends, "temporary, extra, or part-time."

[4] At the instant hearing and again in its brief Respondent contests a somewhat belated effort by the General Counsel to amend the specification as to the nature of the position held by McFadden when demoted. Unquestionably, said amendment entailed a dramatic adjustment in the General Counsel's factual position. Thus, the original wage specification issued on October 21, 1981, averred that McFadden at the time of the discrimination held the position of "temporary foreman," theorizing further that had it not been for his unlawful demotion on February 11, 1980, he would have been promoted to "permanent foreman" on February 27, 1980. In its answer to the backpay specification, Respondent denied the possibility of any such promotion, setting forth affirmatively that McFadden lacked seniority to achieve advancement under the terms of the governing collective-bargaining agreement. Pursuant to the amendment, the General Counsel now asserts that at all times prior to his unlawful demotion, and since March 1979, McFadden was employed as "a regular foreman." In granting the request to amend and overruling Respondent's objection thereto, the rationale I adopted by the undersigned was fully articulated at the hearing. The ruling and basis thereof are hereby reaffirmed, and need not be gainsaid.

the General Counsel for the period April 4, 1981, and September 4, 1981, when McFadden, due to a personal injury, was unavailable for work. The parties further agreed that the backpay obligation tolled on December 31, 1981, when McFadden assumed the duties of president of Local 333, and once again was not available for employment in the industry.

Finally, issues exist, on urging by Respondent, as to whether McFadden failed to accept employment opportunities and to maintain a diligent search for work under conditions warranting determination that he was guilty of a willful loss of earnings, thereby nullifying any entitlement of backpay, or at least a reduction therein.

B. *Gross Backpay*

1. Preliminary statement

With respect to gross backpay due, the General Counsel has adopted a formula which rests upon the assumption that McFadden during the backpay period was entitled to all the benefits of a "regular" foreman. It is also premised upon the assumption that, but for the discriminatory demotion, McFadden would have worked the hours and enjoyed the same average weekly earnings as Theodore Burca, who secured a "regular" foreman position with Respondent within 3 weeks after the demotion of McFadden. Thus, if McFadden's benefits historically and in the future could not be treated as on parity with those of a regular foreman, the General Counsel's formula would prove faulty.

Respondent disputes the propriety of the formula selected by the General Counsel on a myriad of grounds. Its position in this regard is highlighted by challenges to the General Counsel's claim that McFadden was a "regular" foreman. Respondent disputes this, characterizing him as merely a "temporary" foreman and arguing that only those who achieved foreman status in comport with collectively negotiated procedures could claim the status of "regular" foreman.[5] As the argument goes, since McFadden did not attempt to qualify under those procedures, he could not be regarded as a regular foreman. On behalf of Respondent, it is urged that the General Counsel's approach does violence to the collective-bargaining agreement, a consequence avoided if McFadden's backpay were to be reconstructed on the basis of his own, actual average weekly earnings during a representative period *prior* to his unlawful demotion. This alternative theory would also correct what Respondent perceives as an additional inequity in the General Counsel's position. Thus, it is argued that the General Counsel's proposal exaggerates artificially the hours that would have been made available to McFadden in that all regular foremen, including Burca, who bid their jobs as required by contractual practices and secured them after the unlawful demotion of McFadden, would, during the backpay period, have held a preference for work opportunities as against McFadden. Hence, it is argued that McFadden having less ability than Burca and a lower priority for work could not possibly have been assigned the same hours as Burca. Respondent further observes in this connection that prior to his unlawful demotion the hours worked by McFadden were always less than those of regular foremen, and hence the General Counsel's formula is unrealistic to the extent that it fails to recognize this pattern.

Respondent contends further that liability ended on September 4, 1981, when McFadden was reinstated to the position of "temporary foreman." Here again identification of the position held at the time of demotion will prove determinative.

In the alternative, Respondent contends that, even if the replacement formula were appropriate in this case, the General Counsel has misapplied it in several respects. Thus, it is first argued that the evidence does not substantiate that Burca's experience was suitably indicative of McFadden's entitlement. In this respect, Respondent points to undisputed evidence that Burca did not replace McFadden but obtained a job through the bidding procedure, which was initiated by Respondent prior to the demotion of McFadden. Beyond that, it is also contended that the General Counsel's computations of gross backpay rest upon the erroneous notion that the revision of the foreman's weekly guarantee first established in the collective-bargaining agreement effective on October 1, 1980, would have been applicable to McFadden. In this regard, Respondent argues that the guarantee in this new form was not available to temporary foremen and computations resting on a contrary notion are unfounded.

2. Conclusions as of the General Counsel's gross backpay formula

By way of background, it is noted that the hire and employment of regular foremen was not always subject to regulation through collective bargaining in the Port of Baltimore. Prior to 1975, employer discretion was unrestricted. Effective April 8, 1975, however, the filling of such positions could only be effected through portwide advertisement and clearance of bidders,[6] tasks administered by the so-called seniority board. Under the agreements affecting the terms and conditions of employment of longshoremen in the Port of Baltimore, this seniority board is established to administer contractual seniority arrangements and to resolve disputes in connection therewith.[7]

Prior to the unlawful demotion of McFadden, not one of Respondent's regular foremen had been hired pursuant to the aforedescribed bidding procedures. McFadden

[5] Under testimony which I find to be credible, but ultimately to be beside the point, it is concluded that McFadden could not be regarded as a contractually sanctioned "regular" foreman. As shall be detailed, *infra*, under collectively negotiated practices only those who obtained such status through established bidding procedures were recognized contractually. Moreover, though binding on me, I agree in any event with the finding by Administrative Law Judge Ohlbaum to the effect that "What is clear is that McFadden . . . could not under the collective-bargaining agreement be designated or supplied by the Union as, or given the job title of, regular or full-time foreman."

[6] See Resp. Exh. 5.

[7] See G.C. Exh. 4, "Cargo Agreement," art. XIX, p. 117, *et seq.* The duties of the seniority board in this connection were ministerial. Upon request of employers, it advertised vacancies in hiring and meeting halls throughout the port. Bids were then communicated to the seniority board which selected the most senior of the bidders for referral to the Employer. Subject to certain restrictions not relevant here, the Employer was free to accept or reject any such referral.

was no exception. However, all of the others had been advanced to such positions prior to 1975, and obviously such strictures did not obtain in their cases. In other words, subject to possible exception of McFadden, Respondent since 1975 failed to augment its complement of "regular" foreman by a single additional hiring.[8]

As for McFadden, himself, it appears that he had been a longshoreman in the Port of Baltimore since 1956. He was hired by Respondent in 1964 as a tractor operator, leaving active employment in 1972 when elected to office as a union representative. Later he was elected president of Local 333 and served in that capacity from 1975 through 1977. Upon expiration of his term in that year, he was reemployed by Respondent pursuant to leave of absence and resumed his position as tractor operator. It was in March 1979 that McFadden was made a foreman under circumstances subject to a conflict in testimony which shall be resolved below.

In reconciling the contradictory testimony as to the proper measure of McFadden's entitlement, extensive weight has been extended to admitted characteristics of the position he held at the time of his demotion. Thus, after his promotion, McFadden was the only individual in the employ of I.T.O., except for Respondent's regular foremen, who performed no rank-and-file longshoremen work, who served exclusively in a foreman's capacity, and who received the foreman's guarantee of 40 compensable hours per week.[9] He did not punch a timeclock and was assigned work inmediately after all other regular foremen were occupied. It also appears that, like all regular foremen, he was required to be available for work at I.T.O. 365 days a year. In sum, at the time of his demotion, McFadden had all the attributes of a regular foreman. Hence he worked under terms clearly distinct from those who were upgraded for brief intervals to cover demands which were beyond the capacity of the existing complement of regular foremen. Indeed, on this record the single perceptible difference between McFadden and the "regular" foremen employed by Respondent as of February 10, 1980, was the timing of his designation as a foreman. For it occurred after the 1975 change in port practice requiring the advertising and bidding of such positions. Like McFadden, not one of Respondent's "regular" foremen had received their jobs in accordance with these procedures, but unlike McFadden, all others had been designated prior to 1975.

Nonetheless, Respondent points to testimony of Respondent's vice president, William T. Brown, to support the claim that McFadden's status was something less than that of a "regular foreman." In essence, Brown testified that, in 1979, it was McFadden who approached him, twice requesting a foreman's post. Brown recited that he was reluctant, because of his obligations under the bidding procedure, and apprehensive as to whether McFadden possessed sufficient seniority to successfully bid such a position. He claims that, when McFadden on the second occasion requested the job, the latter was informed that because of the bidding procedure, he could not be made a regular foreman but could be given a job as "an extra foreman."[10]

McFadden's version differed materially. He claimed that it was I.T.O. that first made the offer and that Brown afforded McFadden alternatives; namely, the choice of continuing to be a tractor operator while acting as a foreman when required, or to become a permanent foreman enjoying the 40-hour-a-week guarantee. McFadden claimed to have responded that, if he was to be a foreman, he would only accept a permanent position as such; Brown agreed.

Neither Brown nor McFadden impressed me as entirely reliable and the probabilities point convincingly to the truth as lying somewhere between their respective accounts, but closer to that of McFadden than Brown.[11] Firstly, it is my decided impression that the promotion offer originated with Brown. Consistent therewith, he admitted to having held to "a practice of hiring the Local officers when they came out of office . . . as foreman." Nowhere does it appear that McFadden was to be an exception to Brown's policy in this regard. Quite to the contrary, McFadden, according to Brown, was a force to be reckoned with. In Brown's own words, McFadden was "a man that had chased a lot of labor out of the Port and is now in a position where he's out of the Local . . . he can still cause a lot of disruption, and for labor stability, I was willing to say I would give this up." Contrary to Brown, it is concluded that, in the interest of labor stability, on the occasion in question, Brown promoted McFadden on an indefinite basis while clearly manifesting his intention to confer upon him all benefits, if not official status, of regular foremen. Consistent with this view is the conceded fact that, pursuant to such terms, McFadden performed exclusively in a foreman's capacity to the day of his unlawful downgrading.

While I am not persuaded that the instant controversy was discussed or resolved as between Brown and McFadden in March 1979, I agree fully with the observations by Respondent that McFadden could not have been recognized as a regular foreman by virtue of the contract. Yet, primacy must be given to the benefit pack-

[8] See Resp. Exh. 18.

[9] Under the employment practices of Respondent, during the period prior to October 1980, all regular foremen were guaranteed 40 hours work per week and received compensation accordingly.

[10] As shall be seen, "extra" foremen have none of the mentioned benefits of the type that McFadden and "regular" foremen enjoyed. To extend such benefits to an "extra" foreman would serve no discernible business purpose.

[11] In this connection, I have considered Resp. Exh. 2 which is a letter written over Brown's signature in November 1979. That letter was written at McFadden's behest to justify his claim for an income tax deduction covering his second telephone. The representation is made therein that "Mr. Garris McFadden is employed by our organization as a part-time foreman." I did not believe McFadden's testimony that a controversy arose over the excerpted portion of the letter. However, it was written for a purpose obviously having no relationship to technical distinctions between regular and temporary foremen as known in Port practice. See fn. 14, *infra*. At the time, McFadden's interest in a telephone was based upon the fact that he was actively employed only on those occasions when all "regular" foremen were working, a fact not necessarily inconsistent with "regular" foreman status. Indeed, the language utilized in the letter not only justified the second telephone but recognized that as the foreman with the least seniority, working under a guarantee, McFadden worked on an on-call basis. Apart from parole testimony offered through Respondent which I find implausible, there is nothing to suggest that those having "regular" foreman standing do not work on call or part time, or that these terms are incompatible with such status. There would be no need for the guarantee were this not the case.

age he enjoyed at the time of the discrimination. The remedial objective under the Act is to provide remuneration, placing the discriminatee in the position that he would have been in had he not been victimized by unlawful conduct.[12] Thus, the key to analysis in the present circumstances is whether that benefit package would have continued into the indefinite future so as to be a fair yardstick of McFadden's losses. Beside the point are labels that might be suggested out of self-interest or even the fact that the position held by the discriminatee was offensive or inoffensive to the employer's contractual obligation.

It is true that to compute backpay without regard for the contract might in certain circumstances expose an employer to the possibility of double liability. For a Board remedy could conceivably presume an employment status on the part of a discriminatee which might impede job opportunities of others. However, this possibility is of no concern here. For, in this instance, the contractual defense is interposed by a party who during earlier stages of the transaction showed little regard for the contractual rights of others. Thus, Brown, who had been a management representative on the seniority board since 1972, himself described the position conferred upon McFadden in 1979 as involving a status which prevented others from being temporarally upgraded to earn foreman rates on a casual, intermittent basis[13] and also blocked a vacancy whereby an additional "regular" foreman might have been hired. Thus, the job opportunities to be protected by the contract and the seniority board were violated by the upgrading of McFadden in 1979,[14] and Respondent was no less vulnerable to meritorious grievance at that time than would be the case were McFadden *now* considered as entitled to all benefits enjoyed by "regular" foremen.

Turning to other elements, it is first noted that the various grounds on which Respondent contests the General Counsel's formula have been weighed with a clear understanding that the precise degree of loss sustained by the discriminatee cannot be ascertained with precision. It is further understood that the Board in its discretion is entitled to give effect to its remedies by devising formulas which promote "as close approximations as possible." *N.L.R.B.* v. *Brown & Root, Inc. et al.*, 311 F.2d 447, 452 (5th Cir. 1963). Consideration has also been given to the well-established principle that "When an employer's unlawful discrimination makes it impossible to determine . . . backpay . . . the uncertainty should be resolved against the employer." *N.L.R.B.* v. *Miami Coca-Cola Bottling Company*, 360 F.2d 569, 572–573 (5th Cir. 1966).

With this in mind, I reject Respondent's contention that a more appropriate measure of McFadden's entitlement would entail utilization of his actual earnings during the period prior to his demotion. Such a measure is viewed as unduly prejudicial in the circumstances. Thus, it is beyond dispute that, in early 1980, Delta Steamship Company, an existing customer of Respondent, increased dramatically the tonnage handled through Respondent's facilities. More specifically it appears that on February 4, 1980, Respondent notified the seniority board that it had vacancies for three ship foremen.[15] Pursuant thereto on February 22, 1980, Theodore Burca, Walter Yenger, and Donald Wetters were referred to Respondent by the seniority board. Of this group, Burca was advanced to regular foreman on February 27, 1980, and Walter Yenger on March 11, 1980.[16] The aforementioned increase in volume of work during this time frame, even after said positions were filled, impelled hiring of additional ship foremen. Accordingly, on March 11, 1980, Respondent requested that the seniority board post for advertising three foremen vacancies.[17] Pursuant to referrals, Respondent advanced Vernon Durham on April 7, 1980, and William Jones on April 14, 1980, to the position of regular ship foreman.

Prior to their advancement to foreman, Burca, Yenger, Durham, and Jones were employed by I.T.O. in the identical position of tractor operator in which McFadden performed prior to his 1979 upgrading. Accordingly, during the period following the discrimination, it is clear that enhanced work and earning opportunities developed for foremen and to honor Respondent's alternative formula would assume that, but for the discrimination, McFadden would not have participated therein,[18] an unproven assumption which runs counter to Board remedial policy.[19]

[12] See *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177 (1941).

[13] It will be recalled that those who serve on a temporary basis to fill occasional demands for additional foremen are compensated at foreman rates while serving in that capacity.

[14] The position Respondent described as having been awarded McFadden appeared as no more than subterfuge to evade the established bidding procedure. It is highly doubtful that it had utility for any other purpose or for that matter that it had a counterpart on the waterfront. It was costly, impracticable, and more a product of invention to bypass seniority board procedures than one which could rationally be accepted as serving legitimate business interests. On the contrary, the needs of management in the area of immediate work force direction would seem adequately served, as they have been, by utilization of just two classes; namely "regular" foremen, who should be hired solely through the seniority board procedures, and "temporary" foremen who are rank-and-file longshoremen, except for temporary periods in which they are upgraded at the employer's discretion to assist under peak load conditions. McFadden certainly had none of the attributes of this latter category.

[15] See Resp. Exh. 6.

[16] Respondent's witnesses were not in harmony as to Wetters, but it is clear that he was not hired as a ship foreman.

[17] See Resp. Exh. 8.

[18] Respondent cites *Chef Nathan Sez Eat Here, Inc.*, 201 NLRB 343, 345 (1973), for the proposition that the use of actual earnings of a discriminatee in a representative period prior to his discharge is considered to be "the most fair, suitable and equitable formula to employ, and should not be departed from in the absence of special circumstances." However, special circumstances exist here supporting the formula selected by the General Counsel. They consist of the lack of uniformity of the hours worked by I.T.O. foremen, and the fact that the overall work hours are dictated by volume of business, a condition which increased during the post-discrimination period.

[19] The appropriateness of the General Counsel's formula for computing backpay is not negated by the fact that McFadden worked fewer hours than regular foremen prior to his demotion. Obviously, among any class of workers some will work more than others, and indeed, if one is to accept Respondent's own evidence the hours made available to all regular foremen would be a function of seniority and experience. McFadden held less seniority than the others and the number of relative hours worked is plainly neutral to the inquiry. Respondent also observes that in January and February 1980, when work allegedly picked up, McFadden worked less hours than in earlier months. However, there is no indication that McFadden declined any work made available to him during that period. Furthermore, while the record contains evidence that most of Respondent's regular foremen increased their hours during the first quarter

Continued

A more difficult question is presented by the General Counsel's selection of the average weekly earnings of Theodore Burca as the measure of what McFadden would have earned during the backpay period. As Respondent observes, the record does not permit a finding that Burca filled any vacancy created by the demotion of McFadden. Thus, Burca successfully bid a position which Respondent, on February 4, 1980, prior to the discrimination against McFadden, took steps to fill. Furthermore, it would not be a fair assumption that McFadden could successfully have bid that vacancy as against Burca, in that Burca was within a more preferred seniority grouping. Thus, had Respondent not discriminated against McFadden and upgraded Burca, if the contract were strictly followed, Burca having been qualified by the seniority board procedures would, if all other factors were equal, have had a work preference over McFadden. To this extent, there is support for Respondent's contention that Burca's earnings are not proper basis for tracking the average weekly earnings of McFadden during the backpay period. Here again, however, the question in this proceeding is not what was required by the contract, but what inference from logical analysis of the credible evidence tells to be conditions the discriminatee would have enjoyed but for Respondent's unlawful conduct. First, in this regard, it is noted that the evidence in this case fails to establish beyond ambiguity that Respondent would have honored the seniority[20] of the newly hired regular foreman, including Burca as against McFadden.[21] Thus, since March 1979, when McFadden was given a position that should have been advertised and bid through the seniority board, Respondent benefited McFadden at the expense of seniority of other longshoremen in the port. Because of this, Brown conceded that I.T.O. was vulnerable to grievances during the entire period of McFadden's utilization as a foreman.[22] He opined, however, that none was filed because the Union was probably as sensitive as he was to McFadden's political strength in the port, adding that McFadden was as much a "hot potato" in February 1980 as he was in March 1979.[23] Thus, in the total circumstances, a presumption arises that, but for the discrimination herein, Respondent would have continued to maintain "stability" at the expense of other longshoremen and foremen by preserving the special status of McFadden as against all recently hired regular foremen including Burca. Accordingly, on the basis of a confluence of dual principles that ambiguities are to be resolved against the wrongdoer on the one hand, and that a state of events once established is presumed to continue, on the other, the more compelling inference is that the entire benefit package of regular foremen, including seniority, would have been among McFadden's recognized benefits[24] had he not been unlawfully demoted on February 11, 1980. Here again the evidence persuades that the General Counsel's proposed formula is viewed as incorporating the most rational approach.

In addition to the formula Respondent also contests constituent elements of the General Counsel's claim. Thus, the latter seeks compensation for alleged denial to McFadden of the maximum vacation credit. Thus, by virtue of the collective-bargaining agreement, covered

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of 1980 over the last quarter of 1979 there is no breakdown as to the weekly hours worked and hence no basis for critical, comparative analysis with McFadden prior to his February 10 demotion.

[20] I viewed with considerable circumspect testimony by Respondent's witnesses that factors other than seniority controlled the extent to which various foremen were afforded work opportunities. Waterfront experience makes it unlikely that seniority would not be controlling where opportunities decline to the point, requiring a choice between retention of a more senior foreman, and one with less seniority whom the employer deems more qualified. Instead, in this respect, testimony of McFadden that work assignments were controlled on the basis of seniority seemed more probable. I certainly did not believe the testimony of Respondent's witnesses that, because Burca was a more qualified foreman, he would have received greater hours than McFadden by virtue of greater ability. The total record in this proceeding, as well as that made before Administrative Law Judge Ohlbaum, suggests convincingly that the discrimination against McFadden was an aberration and that in other respects Respondent would naturally tend to avoid the type of confrontation that disparagement of McFadden's ability was apt to invite.

[21] The following colloquy between Brown and me is reflective of the acknowledged impact upon contract rights of the treatment accorded McFadden in March 1979:

> JUDGE HARMATZ: What I'm saying is that the spirit of the contract is that you fill foremen slots when you need foremen indefinitely, by the bidding procedure. And that's the way it's been since 1975. Isn't that the spirit of the contract?
>
> MR. BROWN: That's the spirit of the contract. You're absolutely right.
>
> JUDGE HARMATZ: And it's true Mr. McFadden's retention prior to his demotion, with the benefits of a foreman, had the practical effect of blocking a foreman's slot?
>
> MR. BROWN: I agree with that.
>
> * * * * *
>
> JUDGE HARMATZ: It's also a fact, isn't it, that before you bid these jobs, to the extent that you had a guarantee working with Mr. McFadden, others were denied the opportunity to work as casual foremen? Isn't that true, too?
>
> A. Well, here again, Your Honor, when you make a casual foreman, you take him from one job and just promote him that day and put him back in the same job. So, they're not being denied work.

[22] The testimony of Brown in this respect was as follows:

> JUDGE HARMATZ: But, in any event, it is a fact, is it not, in answer to my question, that to the extent prior to his demotion, McFadden was occupying—doing just foreman work, that this impeded others who might have aspired to work as casual foremen when and as they were needed.
>
> MR. BROWN: No. I agree with you. You're right.
>
> JUDGE HARMATZ: And you were vulnerable to grievances on that basis during that entire period, were you not?
>
> MR. BROWN: Yes. I was vulnerable to grievances and there weren't any grievances because, I think, the ILA felt the same way that I felt about him. To them, it was a stability thing, not filing a grievance; to me, it was a stability lever—stability thing by paying the guarantee and getting him off our backs. And that's why I didn't have any grievances.

[23] Burca himself quite possibly was disadvantaged by the 1979 upgrading of McFadden. Both at that time were tractor operators, but Burca had the greater seniority and according to Respondent was more qualified. Thus, in 1979, Burca's seniority was disparaged. It is fair to assume that Burca's seniority as "regular" foreman would have been given no greater force in 1980 *vis-a-vis* McFadden than in 1979 when the desire for "stability" obviously outweighed the rights of other longshoremen.

[24] Interlaced within the above reasoning is awareness that Respondent's future obligation to restore McFadden under any leave of absence would entail preference over Burca and other regular foremen who in the interim were designated as such pursuant to seniority board procedures. Although such a preference has already been grieved and seemingly would violate the contractual rights of this latter group, any remedial obligation imposed in that respect under the contract will have to be shouldered equally with and does not diminish Respondent's obligation to redress the unfair labor practice herein. See Resp. Exh. 10.

employees are entitled to the maximum benefit of 6 weeks' pay if credited with 1,500 or more actual hours of work during the benefit year which runs from October 1 through September 30.[25] During the contract year ending September 30, 1981, McFadden, according to records of the Steamship Trade Association of Baltimore (STA),[26] worked 1,294 hours. The General Counsel contends that, if McFadden is credited with the hours he would have worked but for the discrimination, he would have been eligible for the maximum vacation benefit.[27] Respondent disputes this, specifically averring that because McFadden was not in the labor market between April and September 1981, to credit him with the requisite 15 hours would hold Respondent liable for McFadden's loss of time due to his injury. In this limited respect I disagree with Respondent. For as the General Counsel observes, during the period within the 1981 vacation year in which McFadden actually worked, Burca worked in excess of 2,000 hours. Consistent with the overall analysis herein, it is assumed that it is but for the discrimination, McFadden would have worked these same hours. This, however, does not mean that the relief sought in this connection by the General Counsel shall be granted. For all that is requested is that I issue an order directing Respondent to report to STA that McFadden is to be credited with additional hours worked in both 1981 and 1982 benefit years. Such a request is viewed as beyond the legitimate scope of this proceeding. Under the Board's Rules and Regulations, Section 102.52, jurisdiction herein is limited to "a controversy . . . between the Board and a respondent concerning the *amount of backpay due* . . . ." (Emphasis supplied.) A direction that Respondent provide information to a third party transcends the contemplated issue, fails to contribute to the reduction of backpay to a liquidated sum, and hence, does not entail implementation of the underlying make-whole order. Rather, it is an attempt to expand on or clarify collaterally affirmative provisions of the remedy adopted by the Board which do not purport to define the amount of backpay due. It is true that, if McFadden is entitled to additional vacation pay, the original order lays a foundation for this sum being claimed as part of gross backpay. For, the fact that such benefits are administered and paid by a third party has no influence on the obligation of Respondent under the terms of the backpay order. Nonetheless, for undisclosed reasons, the General Counsel has removed this issue from legitimate scope of the backpay provisions by failing to include vacation pay within his accounting of the gross backpay due and to claim any such sums as part thereof. Pursuant to Section 102.53 of the Board's Rules and Regulations, it is incumbent on the General Counsel in this type of a proceeding to, in his backpay specification, "specifically and in detail show . . . the specific figures and basis of computation as to gross backpay . . . net backpay due, and any other pertinent information." The General Counsel has failed to conform this claim to this clearly expressed requirement. Yet, the noncompliance with the Board's Rules and Regulations precludes final determination of the precise amount of backpay due and requires further litigation to achieve that objective. No excuse appears for the General Counsel's nonadherence to the Board's Rules and Regulations. Data bearing upon the vacation entitlement of McFadden was available to the same extent as other constituent elements of gross backpay.[28] The Board's Rules and Regulations are clearly expressed and unmistakable. They seek to avoid the untoward consequences of protracted litigation and accordingly their breach in this instance is deemed sufficiently material to warrant a denial of vacation pay, if in fact due.

Finally, calculations made by the General Counsel insofar as they relate to the weekly guarantee are challenged. It is noted in this respect that pursuant to the collective-bargaining agreement effective October 1, 1980, the weekly guarantee available for "regular" foremen was revised. In its newly negotiated form, the guarantee was limited to the hours 8 a.m. to 5 p.m., Monday through Friday, and hours worked outside thereof were compensable independent of and would not be charged against the guarantee. Respondent first contends that the General Counsel's gross backpay computation improperly assumes that McFadden would have been compensated on that basis had his employment continued beyond October 1, 1980. Here again, I reject Respondent's view. In doing so, I note my disbelief of the testimony of Brown that, absent the unlawful demotion, he would not have paid McFadden on such a basis. Instead, as it is clear that McFadden was extended all benefits available to regular foremen within the time frame between his 1979 promotion and the instant unfair labor practice, it is logical to presume that, out of sensitivity to McFadden's capacity to cause problems, I.T.O. would have continued this practice into the indefinite future.

Respondent also contends that the General Counsel's calculations are defective in that those covering the period February 11, 1980, through April 4, 1981, fail to take account of the fact that an increase in foremen wage rates did not occur until execution of the new collective-bargaining agreement in October 1980. In this connection, it is noted that the General Counsel's computation of Burca's average weekly earnings failed to distinguish between the period before and after October 1, 1980. Respondent, thus, urges that this action "artificially raises the . . . backpay figures because it applies the higher contractual wage rate at a time that it was not in effect," and accordingly "unjustly enriches McFadden by giving him a contractual benefit for which he was not entitled." Respondent's contention in this regard has merit. Ac-

[25] See G.C. Exh. 4, p. 86.

[26] STA is an organization composed of various steamship lines, steamship agencies, and stevedoring contractors doing business in the Baltimore port area. I.T.O. is an employer-member of STA. STA negotiates collective-bargaining agreements and administers benefits provided therein, including vacation pay.

[27] There is no disclosure whatsoever on this record as to what vacation benefits McFadden received during the backpay period. Am I to assume from this that no error was made, and that he received less than the maximum benefit, or should an adverse inference be drawn on this element of the General Counsel's proof responsibility?

[28] The General Counsel cites *The A. S. Abell Company*, 257 NLRB 1012 (1981). However, it is not entirely clear from the face of that Decision that the specification therein did not include specific figures and the basis of computation as to the gross vacation pay due the discriminatee.

cordingly, I have revised the computations of the General Counsel to accommodate this change by utilizing separately the average weekly earnings of Burca during the first three quarters of 1980, the time frame preceding establishment of the new rate, while separately computing Burca's average weekly earnings of the fourth, first and second quarter of 1981. These revisions to the weekly rate and to quarterly gross backpay are reflected in "Attachments A-1 through A-6" to this Decision. (Omitted from publication.) The formula applied in this respect is not inconsistent with that suggested in Respondent's brief, fn. 19, pp. 15-16. The precise computation appears in "Appendix B."

C. *Willful Loss of Earnings*

Respondent contends that, during the backpay period, McFadden did not fulfill his obligation to engage in a diligent search for work thereby diminishing if not completely negating any backpay obligation. Under settled authority, the burden of proof is upon Respondent in this respect, and McFadden's entitlement shall only be affected upon credible proof that he did not make a "reasonable effort" to secure suitable employment.

In arguing that McFadden should be precluded from any recovery whatever, Respondent points to the absence of evidence that McFadden sought work as a foreman during the backpay period. Notwithstanding misgivings concerning the breakdown in McFadden's recollection thereof, it is clear on the record that vacancies in such positions are available only when posted by the STA seniority board. There being no indication of any such postings during the backpay period, any failure on the part of McFadden to seek such a position is of no consequence.

A more difficult question is presented by Respondent's observation that McFadden is not entitled to backpay on days for which he failed to register at the STA hiring center. During the backpay period, McFadden frequently secured work through the center in his formerly held position as a "tractor driver." Indeed, he acknowledged that his seniority would entitle him to work as a tractor operator on any day that he appeared at the hiring center.[29] Therefore, in his case, mere appearance at the hiring center was tantamount to obtaining a day's work. STA records, at the same time, establish that McFadden failed to register at the center on 47 occasions during the backpay period. From this, Respondent maintains that McFadden should be penalized by reducing backpay for equivalent periods. Consistent therewith, it is concluded that on the above facts the burden is shifted to the General Counsel to establish that McFadden's failure to work on those days was not the equivalent of a temporary withdrawal from the job market, for which the employer should receive credit. In this regard, it appears that the sole explanation lies in McFadden's testimony that on those occasions he was occupied with investigation and prosecution of the unfair labor practice charges he had filed regarding the unlawful demotion.

[29] In this connection it is noted that the record does not disclose that McFadden ever rejected referral or job opportunity available through the hiring center other than offers of work by I.T.O. as a tractor operator.

The impact of such a justification upon an employer's backpay liability is substantially identical to the issue considered by the Board in *Sopps, Inc.*, 189 NLRB 822 (1971) (Members Fanning, Brown, and Kennedy). There the Board considered whether an employer was entitled to an exclusion for the period in which discriminatees attended their unfair labor practice hearing. In rejecting any such view the Board stated:

> The Trial Examiner, while awarding backpay to Fontana for the first 2 days of the unfair labor practice hearing in this case, which she attended under subpena, denied her backpay for the last 5 days of the hearing on the ground that, by continuing to attend the hearing after being released from the subpena, she voluntarily made herself unavailable for potential employment on those 5 days. The General Counsel excepts to this finding, contending that time spent at an unfair labor practice hearing by a discriminatee, whether voluntarily or involuntarily, should not be deducted from gross backpay. We find merit in this contention.
>
> It is well settled that an alleged discriminatee is entitled, as a matter of right, to remain in the hearing room throughout the taking of testimony, since he is regarded as a complainant, whether or not he is the charging party. The alleged discriminatee, whether or not subpenaed, remains part of the General Counsel's case throughout the hearing; he may be needed to rebut any defense presented by the respondent. If the Board denies him relief, in whole or in part, he will be an "aggrieved person" who can seek review of the Board's order in a United States Court of Appeals. For all these reasons, it is clear that a discriminatee attending an unfair labor practice hearing, although un-available for remunerative employment, should not be placed in the same position as a discriminatee who is disabled or has voluntarily withdrawn from the labor market. Indeed the Board has held that a discriminatee is justified in declining to accept a job which would make it impossible for him to attend a hearing.

The above decision would seem to comport logically with Board remedial policy to the effect that discriminatees be made whole for losses directly caused by the employer's unlawful conduct. Yet, in a more recent decision, a gloss was placed upon *Sopps, Inc.*, which in my view entailed a complete reversal of position. Thus, in *Iowa Beef Processors, Inc.*, 255 NLRB 1328 (1981) (Chairman Fanning, Members Jenkins and Zimmerman), an administrative law judge recommended a remedy for discriminatorily discharged employees which included, *inter alia*, the following direction:

> Backpay shall include any income lost by the discriminatees because of their attendance at the present trial. *Sopps, Inc.*, 189 NLRB 822 (1971).

The Board disagreed with the appropriateness of such a provision, stating as follows:

> Respondent excepts, *inter alia*, to that part of the remedy in which the Administrative Law Judge, relying on *Sopps, Inc.*, 189 NLRB 822 (1971), recommended that backpay include any income lost by the discriminatees because of their attendance at the hearing. We find merit in this exception. In *Sopps, supra*, the Board held that in computing backpay a discriminatee attending an unfair labor practice hearing was not to be considered as possessing the same status as a discriminatee who had voluntarily withdrawn from the labor market. It does not follow, however, that the Board requires employers to compensate employees for attending Board hearings. Accordingly, we hereby delete the sentence in that Remedy which reads: "Backpay shall include any income lost by the discriminatees because of their attendance at the present trial. *Sopps, Inc.*, 189 NLRB 822 (1971)." [255 NLRB 1328 at fn. 3]

Although the Board did not expressly overrule *Sopps, Inc.*, the language employed cuts deeper than necessary simply to support nonsubstantive, editorial revision. According to my interpretation, *Sopps, Inc., supra*, did *in effect* require employers to compensate for "any *income lost* by the discriminatees *because* of their attendance at . . . trial." (Emphasis supplied.)

On authority of *Iowa Beef Processors, Inc., supra*, the gross backpay due shall be credited, consistent with the following:

Period	*Days Absent*	*Daily Earnings*[30]	*Quarterly Credit*
1st qtr., 1980	21	$87.20	$1,831.20
2d qtr., 1980	6	87.20	523.20
3d qtr., 1980	7	87.20	610.40
4th qtr., 1980	8	94.00	752.00
1st qtr., 1981	5	94.00	470.00

Beyond the above, no reduction of gross backpay will be sustained. Thus, I reject Respondent's contention which envisages McFadden as having been obligated to accept work as a tractor operator with I.T.O. His refusal to do so failed to toll or otherwise reduce gross backpay. Consistent with the observation of the General Counsel in this respect, the position of tractor operator called for a lesser wage rate and was not subject to the various guarantees applicable to foremen. It simply was not "substantially equivalent" to the job from which McFadden was ousted unlawfully. Under established Board policy, McFadden had no obligation to accept any offer of reinstatement from I.T.O. unless both unconditional and to a substantially equivalent position. See *Glass Guard Industry, Inc., a Division of Guardian Industries*, 227 NLRB 1140, fn. 3 (1977).

III. CONCLUSIONS

Based upon the foregoing facts, and the entire record in this proceeding, it is concluded that the following amounts constitute the backpay due and owing Garris McFadden for the backpay period covered by this proceeding:

Year	*Quarter*	*Gross Backpay*	*Interim Earnings*	*Not Available For Work (Credit)*	*Net Backpay*
1980	1	$6,084.68	$570.00	$1,831.20	$3,683.48
	2	11,300.12	5,340.00	523.20	5,436.92
	3	11,300.12	6,241.00	610.40	4,448.72
	4	14,450.80	5,980.00	752.00	7,718.80
1981	1	14,450.80	7,868.00	470.00	6,112.80
	2	1,111.60	1,700.00	—	—
	3	5,925.70	3,437.00	—	2,488.70
	4	14,221.68	8,230.00	—	5,992.00
					$35,881.42

[30] The daily earnings have been determined by multiplying the rate applicable to tractor drivers by 8 hours. The credits are reflected on the attached Appendixes A-1 through A-6 [omitted from publication].

On the basis of the foregoing, I hereby issue the following recommended:

ORDER[31]

I.T.O. Corporation of Baltimore, its officers, agents, successors, and assigns, shall pay to Garris McFadden the sum of $35,881.42 plus interest accrued to the date of payment as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[32]

[31] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[32] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

APPENDIX B

Revised Computation - Average Weekly Earnings (Burca)

1. Payroll Period	$511.45	2. Payroll Period	$861.70
ending 3/1/80	675.80	Ending	1,126.60
to 9/27/80	899.25	10/4/80 to	956.30
	675.80	4/4/81	936.65
	1,220.80		818.75
	855.65		1,205.20
	675.80		1,237.95
	806.60		838.40

Revised Computation - Average Weekly Earnings (Burca)—Continued

	1,160.85		1,021.80
	1,258.95		1,080.75
	866.55		1,100.40
	866.55		1,087.30
	1,346.15		1,414.80
	915.60		1,336.20
	681.25		995.60
	1,002.80		818.75
	833.85		1,074.20
	730.30		1,270.70
	288.85		1,237.95
	893.80		1,133.15
	741.20		1,382.05
	1,226.25		1,349.30
	1,008.25		1,323.10
	746.65		1,296.90
	795.70		979.95
	839.30		1,192.10
	703.05		936.65
	850.20		936.65
	1,171.75		
	828.40		
Gross Earnings Divided by 30 Weeks	$26,077.40	Gross Earnings Divided by 27 Weeks	$30,013.20
Average weekly earnings	$896.24	Average weekly earnings	1,111.60